LIBRARY
SUPREME COURT, U. S.

No. 485

FILED
SEP 12 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

AT WASHINGTON, D. C.

NATHAN INMAN GOFF, JR.,
Petitioner,

vs.

SUE ELLEN WEEMS KINNEY GOFF,
Respondent

REPLY BRIEF OF RESPONDENT TO PETITION FOR WRITS OF CERTIORARI AND SUPERSEDEAS

TOM P. MITCHELL,
Attorney for Respondent,
60 North Third Street
Memphis, Tennessee 38103

HEARN W. TIDWELL,
Suite 1101
Home Federal Building
Memphis, Tennessee 38103

Of Counsel

The Daily News, Memphis, Tenn., 9/8/67—25c

COUNTER STATEMENT OF QUESTIONS INVOLVED

I

Proceedings for divorce and control of funds for alimony and child support are wholly statutory and therefore, no Federal question is involved in this proceedings.

Petitioner's claim of jurisdiction is not supported by Federal Rules of Civil Procedure or case law.

II

Do the Statutes of the State of Tennessee vest authority in the Circuit and Chancery Courts to determine a division of properties, both real and personal, for the purposes of alimony and support and maintenance of children of the Petitioner?

The Statutes of the State of Tennessee do concisely and precisely grant jurisdiction of the assets of the parties by the trial court, both pendente lite and permanently, for the benefit of the wife and minor children.

III

Did the Petitioner, by virtue of the Consent Order Modifying Injunction, as entered April 12, 1966, waive his Constitutional or statutory right to except to the ruling of the Court?

The Court of Appeals for the Western Division of the State of Tennessee, in denying the Petitioner's relief on his Petition for Certiorari, held that the action of the Petitioner before that court, with respect to the Decrees as entered by the trial court, were purely interlocutory in nature and that the case should be proceeded within the court below to a final Decree before any relief could be granted by an appellate court.

IV

Do the Statutes of the State of Tennessee authorize the Judges of the Circuit Court or Chancellors of the Chancery Court to impose restrictions pendente lite upon trust agreements and thereby hold in abeyance any funds subject to control by the Petitioner, pending a hearing of the cause on its merits?

All Statutes of the State of Tennessee conferring jurisdiction upon the trial courts effectively confer discretionary power to such tribunals, both as to pendente lite and final Orders and Decrees.

TABLE OF CONTENTS

	Page
Counter Question of Statements Involved	i
Brief and Appendix of Respondent, Sue Ellen Weems Kinney Goff	1
Counter Question of Statement No. I	3
Counter Question of Statement No. II	4
Counter Question of Statement No. III	6
Counter Question of Statement No. IV	7
Argument	8
Affidavit	9, 10
Certificate of Service	10
Appendix	1a

STATUTES

TENNESSEE CODE ANNOTATED

Section 36-820	3, 4, 7
Section 36-822	4, 5, 6, 7
Section 16-508	7, 8
Section 36-821	4, 1a
Section 36-825	7, 1a
Section 36-835	7, 2a

UNITED STATES CODE

Title 28, Paragraph 1251, et seq.	2
Title 28, Paragraph 1257	3

INDEX TO APPENDIX

TENNESSEE CODE ANNOTATED
Section 36-821 ..... 1a

TENNESSEE CODE ANNOTATED
Section 36-825 ..... 1a

TENNESSEE CODE ANNOTATED
Section 36-835 ..... 2a

IN THE

SUPREME COURT OF THE UNITED STATES

AT WASHINGTON, D. C.

NATHAN INMAN GOFF, JR.,
Petitioner,

vs.

SUE ELLEN WEEMS KINNEY GOFF,
Respondent.

No.....

REPLY BRIEF OF RESPONDENT TO PETITION FOR WRITS OF CERTIORARI AND SUPERSEDEAS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

BRIEF AND APPENDIX OF RESPONDENT, SUE ELLEN WEEMS KINNEY GOFF

Petitioner has presented ten (10) Assignments of Error, which may be reduced to four, in accordance with Respondent's Counter Statement of Questions Involved.

This cause has not been tried upon its merits; therefore, no right of appeal is granted to the Petitioner. The Motion of the Petitioner before the trial court for a discretionary appeal was properly denied by the trial court in that the Petitioner, before that court, could have preserved all his exceptions to the rulings of the trial Court by the

authorized statutory procedure of Wayside Bill of Exceptions. This the Petitioner failed or neglected to do.

Jurisdiction is predicated by the Petitioner upon Amendment V and Amendment XIV to the Constitution of the United States. The entire record in this cause contains numerous summons which were personally served upon the Petitioner. The Petitioner having removed himself from the jurisdiction of the trial court, pending hearing of the cause, some of these processes are shown "NOT TO BE FOUND". The original process in this cause was instituted for and on behalf of the Petitioner on his Original Bill for Divorce, filed in the Circuit Court of Shelby County, Tennessee, on December 23, 1965, (tr. p. 6) Respondent's Answer and Cross-Bill for Separate Maintenance (tr. p. 27) was filed January 5, 1966 and personal process was served upon Nathan Inman Goff, Jr. on January 5, 1966. Thereafter all legal processes were returned "NOT TO BE FOUND IN SHELBY COUNTY". The Petitioner, therefore, has not been deprived of his property without due process of law in accordance with Amendment V to the Constitution of the United States.

Jurisdictional question two as raised by the Petitioner relies upon the denial of equal protection of the law as set forth in Amendment XIV to the Constitution of the United States. The Petitioner at all time has been represented by competent counsel and no Orders, Decrees or action of the trial court has been determined or Order entered without counsel for the Petitioner being given a complete hearing.

By virtue of Title 28, Paragraph 1251, et seq., U. S. Code, jurisdiction of this Honorable Court cannot be maintained for the following reasons:

1. This is a cause of action between two individuals.

2. Title 28, Paragraph 1257, U. S. Code, provides that Writ of Certiorari may be entertained by this Honorable Court from final judgments or decrees rendered by the highest court of a state in which a decision could be had, only upon limited questions involving the validity of a treaty or statute of the United States or where the validity of a state statute is drawn in question on the grounds of its being repugnant to the Constitution of the United States.

COUNTER QUESTION OF STATEMENT NO. I

Section 36-820, Tennessee Code Annotated, being Chapter 8, of Title 36, styled, "Divorce or Annulment", the following statute was in full force and effect at all times during this proceeding:

"T.C.A. 36-820, Alimony for support of wife and children.

Whether the marriage be dissolved absolutely, or a perpetual or temporary separation be decreed, the court may make an order and decree for the suitable support and maintenance of the complainant and her children, or any of them, by the husband, **or out of his property, according to the nature of the case and the circumstances of the parties, the order or decree to remain in the court's control**; and, on application of either party, the court may decree an increase or decrease of such allowance on cause being shown. Courts having jurisdiction of the subject-matter and of the parties are hereby expressly authorized to provide for the future support of wives and children, in proper cases, by fixing some definite amount or amounts to be paid in monthly, semi-monthly, or weekly instalments, or otherwise, as circumstances may warrant, and such awards, if not paid, may be enforced by any appropriate process of the court having jurisdiction thereof, including levy of execution. The order or decree of the court may provide that the payments for

the support of such child or children shall be paid either to the clerk of the court or direct to the mother or other person awarded the custody of said child or children." (emphasis supplied)

The validity of this statute has not been attacked by the Petitioner as being repugnant to the Constitution of the United States or any laws of the United States.

Petitioner assigns as error that the trial court abused its discretion in that it completely stripped the Petitioner of all of his rights to continue his business or personal affairs. By the Consent Order as entered in the cause on April 12, 1966 (tr. p. 61) the Petitioner before this Honorable Court agreed to a division of his properties for the purposes of this litigation and is therefore now estopped to deny that his property was taken without due process of law. This Consent Order, approved by the trial judge, was entered by consent of counsel representing both parties and no exceptions were taken to the action of the court in signing and entering the Order upon the Minutes of the Court. We find no denial of due process of law or any denial of equal protection of the law when any person, through his counsel of record, enters into a Consent Order or Decree. Petitioner's assertion of abuse of discretion cannot be well founded upon his having consented to the provisions as set forth in the Order of April 12, 1966 (tr. p. 61). Tennessee Code Annotated Section 36-821.

COUNTER QUESTION OF STATEMENT NO. II

Section 36-820 T.C.A., supra, coupled with Section 36-822 T.C.A., vests the authority and power within the trial court to enforce its Orders and Decrees. Section 36-822 Tennessee Code Annotated reads in words and figures as follows:

"T.C.A. 36-822. Enforcement of Decree for Alimony and Support.

The court may enforce its orders and decrees by sequestering the rents and profits of the real estate of the husband, if he has any, and his personal estate and choses in action, and by appointing a receiver thereof, and from time to time causing the same to be applied to the use of the complainant and her children, or by such other lawful means as are usual and according to the course and practice of the court, as to the court shall seem meet and agreeable to equity and good conscience.

The wife or other person to whom the custody of the child or children is awarded, shall be entitled to enforce the provisions of the court's orders or decrees concerning the support of such child or children, and to recover judgment for defaults in the payments directed and to obtain execution thereon and otherwise enforce payment thereof, all on behalf of the child or children.

The wife in her own behalf, or the wife or other person to whom the custody of the child, or children, is awarded, may recover from the husband reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, or in regard to any suit or action concerning the adjudication of the custody or the change or custody of any child, or children, of the parties, both upon the original divorce hearing and at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of such court."

The validity of this statute has not been attacked by the Petitioner as being repugnant to the Constitution of the United States or any laws of the United States.

COUNTER QUESTION OF STATEMENT NO. III

This cause still remaining to be heard upon its merits, is currently of an interlocutory nature and all orders and decrees of the trial court are pendente lite and therefore, the cause has not proceeded to any final order or decree with respect to the property rights or assets of the Petitioner, other than that as contained in the Consent Order Modifying Injunction dated April 12, 1966.

Petitioner assigns as error the Order of the Court entered on August 12, 1966 (tr. p. 73). This particular matter came before the court upon the Motion of Respondent, Sue Ellen Weems Kinney Goff, (tr. p. 71) for an Order disbursing funds on hand with the Trustee and to allow Richard T. Ely, Esquire, Counsel for Petitioner, to resign as Trustee and file an accounting. The learned trial judge, based upon the proper motion before the court, ordered that certain dividends as had been received on the gold stock of the Petitioner be divided equally between the Petitioner, Nathan Inman Goff, Jr., and the Trustee in order to insure the payment of alimony and child support as previously decreed by the court. This would follow to have been within the power and authority vested in the trial court in accordance with Section 36-822 T.C.A., supra. We respectfully refer the court to the wording of the Order entered by the court as follows:

> "Further, the court is of the opinion, that the said Nathan Inman Goff, Jr. would be protected, in that his own attorney would hold said funds, notwithstanding his holding it as trustee, should he so elect." (tr. p. 74)

This Order further provided that the Honorable Richard T. Ely, Trustee, could in his discretion, resign as trustee, and upon proper accounting pay the remaining funds held

by him as trustee into the hands of the Clerk of the Court. This accounting and payment was to be made to the Clerk of the Court for the use and benefit of the Respondent and her two minor children.

It was upon this Order that the Petitioner prayed for a discretionary appeal which was refused by the Court. The power and authority of the trial court to act in this regard is specifically authorized by Section 36-820 T.C.A., supra, and Section 36-822, T.C.A., supra. The validity and/or Constitutionality of these statutes has not been questioned by Petitioner. Tennessee Code Annotated Sec. 36-825.

COUNTER QUESTION OF STATEMENT NO. IV

By order of the Court entered February 4, 1966 (tr. p. 38) the court awarded your Respondent the sum of $243.00 per month as support and maintenance for herself and her two minor children until further orders of the court. Petitioner assigns as error that it was improper for the trial court to make statements to the effect that Petitioner was in contempt of court or might be in contempt of court. By virtue of the Consent Order Modifying the Injunction (tr. p. 61) the court ordered that the Petitioner, Nathan Inman Goff, Jr., pay to his wife as support and maintenance the sum of $729.00 which represented an arrearage of support and maintenance for the months of February, March and April 1966 and therefore, the Petitioner was in contempt of court and subject to the power and authority of the court to so determine, based upon its order of February 4, 1966. Tennessee Code Annotated Sec. 36-835.

The Circuit Courts of the State of Tennessee are granted concurrent jurisdiction with that of the Chancery Courts to act on matters in trust. Section 16-508 T.C.A. grants the concurrent jurisdiction as follows:

"16-508. Divorce — Adoption — Trustees. — It has concurrent jurisdiction with the Chancery Court to grant divorces, to authorize the adoption of children, to release testamentary and other trustees, and to appoint trustees in place of those released or dead, and also to decree, on petitions of trustees, by will or otherwise, for the sale of property, real or personal."

The validity of this statute has not been attacked by the Petitioner as being repugnant to the Constitution of the United States or any laws of the United States.

ARGUMENT

The questions presented to the court for decision on this Petition for Writ of Certiorari and Supersedeas are based upon jurisdiction and abuse of discretion on the part of the trial judge.

A review of this entire record and a careful analysis of all cases cited by the Petitioner fails to reveal any federal jurisdictional question in matters between two citizens in which the validity of the Constitution of the United States or of a state statute has been affirmatively attacked by the Petitioner. The cause being at issue and awaiting trial, all orders and decrees as entered in the cause await the hearing and actual trial upon the merits. All action of the trial court has been to preserve and protect such rights and interests as the Respondent may have in the properties of the Petitioner as alimony and child maintenance and care after a hearing.

The injunctive orders of the court were likewise enforced to preserve and maintain in status quo certain assets of the Petitioner pending a trial on the merits. All real property of the Petitioner, not owned as tenants by the entirety by the parties, has been released to the Petitioner and an

equal division of the personal property has been ordered to the Petitioner and the Clerk of the Circuit Court in Trust for the future determination of the trial court, even though the Petitioner has removed himself from the jurisdiction of the court. No other affirmative relief could be granted to insure enforcement of the future orders of the trial court.

It is respectfully urged that the rights of both individuals have been given fair and equitable consideration by the trial court and that, therefore, all the assignments of error are not well founded and that Petitioner's Writ of Certiorari and Supersedeas should be denied in accordance with the authorities as set forth in this Brief and in conformity to the Order denying the Petition for Writ of Certiorari and Supersedeas by the Tennessee Court of Appeals and the Supreme Court of the State of Tennessee.

Respectfully submitted,

Tom P. Mitchell

TOM P. MITCHELL
Counsel for Respondent

Hearn W. Tidwell

HEARN W. TIDWELL
Counsel for Respondent,
of Counsel

STATE OF TENNESSEE
COUNTY OF SHELBY

I, Tom P. Mitchell, being duly sworn, make oath that I am counsel for the Respondent, Sue Ellen Weems Kinney Goff; that I am familiar with the facts stated in the foregoing Reply Brief and that the same are true, except those stated on information and belief, and those I believe to be

true, and further that, in my opinion, Respondent is entitled to the relief prayed.

Tom P. Mitchell
TOM P. MITCHELL

Sworn to and subscribed before me this 11 day of September, 1967.

B Joyce Thomas
Notary Public

My commission expires:

.....

MY COMMISSION EXPIRES JULY 14, 1969

CERTIFICATE OF SERVICE

I certify that I have this day mailed two copies of this Brief and Appendix to Richard T. Ely, Esquire, Counsel for Petitioner, addressed to his office, 1100 Home Federal Building, Memphis, Tennessee, 38103 this 11 day of September, 1967.

Tom P. Mitchell
Tom P. Mitchell
Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

AT WASHINGTON, D. C.

NATHAN INMAN GOFF, JR.,
Petitioner,
vs.
SUE ELLEN WEEMS KINNEY GOFF,
Respondent.
} No.....

APPENDIX

TENNESSEE CODE ANNOTATED:

Section 36-821. **Portion of husband's estate decreed to wife.**

In such case, the court may decree to the wife such part of the husband's real and personal estate as it may think proper. In doing so, the court may have reference and look to the property which the husband received by his wife at the time of the marriage, or afterwards, as well as to the separate property secured to her by marriage contract or otherwise.

(Code 1858, § 2469 (deriv. Acts 1841-1842, ch. 133, § 2); Shan., § 4222; Code 1932, § 8447.)

TENNESSEE CODE ANNOTATED:

Section 36-825. **Adjustment of interests in jointly owned property.**

In all actions for divorce or separate support and maintenance, the court having jurisdiction thereof may, in its discretion, adjust and adjudicate the respective rights

and interests of the parties in all jointly owned property, so as to preserve for each or either party, that portion of such jointly owned property as may be just and reasonable under the facts and circumstances of the case, regardless of how the court may grant or refuse to grant relief in such case; and to this end the court shall be empowered to effectuate its decree by divesting and reinvesting title to such property and, where deemed necessary, to order a sale of such property and to order the proceeds divided between the parties.

(Acts 1953, ch. 90, § 1 (Williams, § 8446); 1959, ch. 192, § 1.)

TENNESSEE CODE ANNOTATED:

Section 36-835. **Enforcement of order or decree for support of minor.**

When any person, ordered to provide support and maintenance for a minor child or children, shall fail to comply with said order or decree, such person may, in the discretion of the court, be punished by imprisonment in the county workhouse or county jail for a period not to exceed six (6) months.

(Acts 1961, ch. 201, § 1.)